In the

Supreme Court of the United States

October Term, 1957

No. 938

RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT AS TO JURISDICTION

ROBERT J. FLETCHER
THOMAS B. GAY
WILLIAM H. WALDROP, JR.
H. MERRILL PASCO
Counsel for Appellant

HUNTON, WILLIAMS, GAY,
MOORE & POWELL
1003 Electric Building
Richmond, Virginia
Of Counsel for Appellant

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STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment of the Supreme Court of Appeals of Virginia entered on December 2, 1957, affirming an order of the State Corporation Commission of Virginia, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported in 199 Va. 589 and 100 S. E. 2d 785. The opinion of the State Corporation Commission of Virginia is not yet reported. A copy of the opinion of the Supreme

Court of Appeals of Virginia is attached hereto as Appendix B and a copy of the opinion of the State Corporation Commission is attached hereto as Appendix A.

JURISDICTION

This proceeding was initiated by petition to the State Corporation Commission of Virginia under Section 58-672 of the Code of Virginia (1950) for the correction of an assessment of a *franchise* tax for the year 1956 imposed upon Appellant by it pursuant to the provisions of § 58-546 of Article 4 of Chapter 12 of Title 58 of the Code of Virginia (1950), as amended, by the 1956 Session of the Virginia General Assembly (Acts 1956, Chapter 612), and for a refund of such tax. The Virginia Commission denied the refund and dismissed the petition. The judgment of the Supreme Court of Appeals of Virginia affirming such action was entered on December 2, 1957, and the notice of appeal was filed in that Court on December 31, 1957.

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, U. S. Code, Section 1257(2) as the decision was rendered by the highest court of the State of Virginia and held that the Virginia statute was not repugnant to the Constitution of the United States.

The following decisions sustain the jurisdiction of the Supreme Court to review by appeal the judgment in this cause: *Railway Express Agency* v. *Commonwealth of Virginia*, 347 U. S. 359 (1954); *Hughes* v. *Fetter, et al.*, 341 U. S. 609 (1951); *Western Maryland Railway Co.* v. *Rogan*, 340 U. S. 520 (1951); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., et al.*, 340 U. S. 179 (1950); and *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69 (1946).

QUESTIONS PRESENTED

The Federal questions presented to the State Corporation Commission and the Supreme Court of Appeals of Virginia and on this appeal are:

1. Whether the tax as imposed upon Appellant for the year 1956 pursuant to Sections 58-546 and 58-547, Article 4, Chapter 12, Title 28 of the Code of Virginia (1950), as amended by the 1956 Session of the Virginia General Assembly, is not in fact an excise or privilege tax upon its right *to do solely an interstate express business in Virginia* in contravention of the Commerce Clause of the Constitution of the United States (Art. I, Section 8, par. 3).

2. Whether the amount of such tax imposed upon Appellant for the year 1956 was determined by the State Corporation Commission in such manner as to constitute a violation of Appellant's rights under the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States.

STATUTE INVOLVED

The statute of the State of Virginia, whose validity is questioned, consists of §§ 58-546 and 58-547 of Article 4, Chapter 12, of Title 58 of the Code of Virginia, as amended March 31, 1956 (Virginia Acts 1956, Chapter 612), reading as follows:

> § 58-546. Franchise tax on express companies. — Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.

§ 58-547. Amount of franchise tax.—The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State.

The whole of Article 4, Chapter 12, Title 58 of the Code of Virginia, as amended, is printed as Appendix C hereto.

STATEMENT OF THE CASE

Appellant is appealing from the decision of the Virginia Court on the constitutional grounds stated above. The history of the Virginia gross receipts tax on express companies as applied to Appellant is a significant aspect of this appeal and will be summarized briefly before discussing the facts in the present case material to the questions presented.

Prior to 1956 § 58-547 of the Code of Virginia, 1950, and its antecedent sections imposed an annual *license* tax on express companies *for the privilege of doing business* in Virginia in addition to the annual registration fee and property taxes provided for in the other sections of the Code. Appellant paid under protest the tax imposed upon it pursuant to § 58-547 from 1931 until 1951, when this Court in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), held that the Connecticut tax on the privilege of doing solely an interstate business in that State violated the commerce clause of the Federal Constitution. Thereafter Appellant sought refunds for the license taxes paid pursuant to Code Section 58-547 for the years 1950 and 1951. The Virginia Commission and the Supreme Court

of Appeals of Virginia held that the tax assessed pursuant to Code Section 58-547 was a *property* tax on the intangible elements of value generated by the employment in business of the physical properties of express companies and was not a *license* or *excise* tax and therefore not violative of the Commerce Clause of the Constitution of the United States when applied to Appellant engaged solely in interstate commerce in Virginia. This Court reversed the decision of the Virginia courts in 347 U. S. 359 (1954) on the ground that the tax was in reality a license tax imposed for the privilege of doing solely an interstate business and therefore violated the Commerce Clause of the Constitution of the United States. As a result, the license taxes paid to the State by Appellant for the years 1950 through 1953, inclusive, were refunded. No license taxes were assessed against Appellant in 1954 and 1955.

At its 1956 Session the General Assembly of Virginia amended and re-enacted Article 4 of Title 58 of the Code of Virginia in the manner indicated in Appendix C which resulted in this proceeding. *The effect of the amended statute was to change the name but not the incidence of the tax.*

In its 1956 return of property to the State Corporation Commission of Virginia for tax purposes, pursuant to Section 58-548 of the Code of Virginia (1950), Appellant stated that it "has no way of determining what part of the receipts derived by it from such business was earned 'in business passing through, into or out of this State'" as contemplated by Section 58-547 of the Code. The Commission, however, devised a formula for determining gross receipts derived by the Company from its interstate business in Virginia which it ascertained to be $6,499,519, or 1.7 percentum of its total gross system revenue of $387,241,764,

and imposed a franchise tax thereon pursuant to the provisions of Section 58-547 of the Code of Virginia (1950), as amended, in the amount of $139,739.66. This tax was paid on September 26, 1956, under protest.

On October 18, 1956, Appellant filed with the Virginia Commission a petition under Section 58-672 of the Code of Virginia (1950) for correction of such assessment and for refund of the franchise tax of $139,739.66 paid thereon for the reasons that the tax so imposed constituted a burden upon or regulation of interstate commerce, in contravention of Article I, Section 8, paragraph 3, of the Constitution of the United States and the taking of the Delaware company's property and a denial to it of due process of law under the Fourteenth Amendment to the Constitution of the United States.

The matter was heard by the Virginia Commission on December 17, 1956. It then appeared that Appellant was organized in 1929 by 86 (now 68) of the railroads of the United States at the suggestion of the Interstate Commerce Commission, and acquired the properties of American Railway Express Company, which had in turn been organized in 1918 at the instance of the then Director General of Railroads of the United States, so that one operating agreement might then be made by it with him as such Director General, rather than with the several independently owned and operated express companies then doing business in the United States. The Appellant immediately applied for authority, as a foreign corporation, to do an *intrastate* express business in Virginia, which was denied by the Commission on the ground that Section 163 of the Constitution prohibited any foreign corporation from carrying on, in this State, the business, or exercising any of the powers or functions of a public service corporation (S.C.C. Reports, 1929, p. 252).

This holding was affirmed in 1929 by the Supreme Court of Appeals of Virginia (153 Va. 498), and by this Court in 1931 (282 U. S. 440).

Since the foregoing decisions expressly held that "no question of the right of Appellant to do an *interstate* express business in this State" was involved but that Section 163 of the Constitution of Virginia only inhibited its conduct of an *intrastate* express business, Appellant immediately caused Railway Express Agency, Incorporated, of Virginia (here called the Virginia company), a wholly owned subsidiary, to be organized in 1931, to conduct such intrastate business. Since that time Appellant has conducted only an *interstate* express business in Virginia, and the Virginia company has done solely an *intrastate* express business in this State. Both companies have annually reported to the Virginia Commission, on forms prepared and promulgated by it, their gross receipts derived from interstate and intrastate commerce, respectively, and their property, real and personal, tangible and intangible, in Virginia, and have also paid the license or franchise and property taxes so determined by the Virginia Commission to be annually due the State of Virginia and the property taxes due the localities in which such property was located.

Prior to 1950 Appellant's express refrigerator cars had been treated by the Virginia Commission as rolling stock of a "car line" company and assessed against it *as such* under Article 5, Chapter 12, Title 58 of the Code of Virginia (1950). Because of the limited mileage travelled by such "rolling stock" in Virginia, it had no substantial taxable situs in Virginia and the *taxes* imposed on it were of nominal amounts.[1] No tax has been imposed upon Ap-

[1] In 1943 $2.40, in 1944 88¢, in 1945 $1.60, in 1946 $1.05, in 1947 no assessment, in 1948 $75.10, in 1949 $489.89.

pellant's rolling stock (refrigerator cars) for the years 1950-1955 because of its contention and of the Virginia Commission's conclusion that Appellant was not a "car line" company and that its rolling stock was therefore not taxable against it *as such*.

From Appellant's 1956 return it appeared that it owned *intangible* personal property (money on deposit) of a value of $120,110.70; tangible personal property (consisting of automotive equipment and trucks) of a value of $239,465.24 and $23,254.39, respectively; office furniture and equipment of a value of $42,884.83, and real estate of a value of $32,850.00, a total property value in Virginia on the taxable date of $458,565.16. From the same return it also appeared that the depreciated nationwide *system* value of the *same classes* of company property was $79,700,426.00.

The Virginia Commission made no assessment upon Appellant's money or rolling stock for the year 1956 upon the theory that the franchise tax imposed by Section 58-546 was *in lieu* of any property tax thereon. However, had such taxes been assessed upon its money on deposit and express refrigerator cars as "rolling stock", upon the basis employed in the formula applied for determining such taxes in 1950 (on 1949 values) they would have amounted to $252.21 and $427.56 respectively for 1956.

The "Standard Express Operations Agreement" between Appellant and the railroads, steamship lines, and airlines over the lines of which Appellant transports express matter, leaves Appellant "no net taxable income", since all of its revenue except operating expenses and fixed charges is paid over to such corporations as compensation for transporting express matter over their respective lines. The revenue thus received by the railroads operating in Virginia is sub-

ject to taxation under Section 58-519 as a part of *their* gross receipts.

By its order of March 1, 1957, the Commission held, for reasons stated in its opinion (Appendix A hereto), that the tax imposed by Section 58-546 was a *property* tax upon the good-will or going concern value of Appellant's *interstate business in Virginia* measured by the gross receipts which it determined, on a mileage basis, Appellant had earned from such business in Virginia in 1955. It, therefore, upheld the tax and denied the Appellant's application for refund of the tax. The Supreme Court of Appeals of Virginia in its opinion handed down December 2, 1957, upheld the validity of the tax upon the same ground (Appendix B hereto).

How the Federal Questions Are Presented

The two constitutional questions were first raised before the Virginia Commission in paragraph 6 of Appellant's petition for correction of the assessment and a refund of the tax in question, where the tax was alleged to be (1) a *license* tax on the privilege of doing interstate commerce and therefore in violation of the Commerce Clause of the Constitution of the United States, but (2) if held to be a *property* tax, it deprived Appellant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution because of the amount of the tax is grossly disproportionate to Appellant's taxable property in Virginia.

The Virginia Commission in its opinion in support of its order denying the refund (Appendix A hereto) specifically held (a) that the tax was not a tax on the *privilege* of carrying on an interstate business in Virginia but an *intangible property tax* and therefore no burden on interstate com-

merce (Appendix A, App. pp. 14-20) and (b) that the amount of the tax as a *property* tax was properly determined by use of a proportion of Appellant's gross receipts and violative of no constitutional rights of Appellant (Appendix A, App. pp. 20-22).

On appeal to the Supreme Court of Appeals of Virginia, Appellant raised the two constitutional questions in the following assignments of error in its opening brief filed with that Court as required by its rules:

> "3. The Commission erred in imposing a franchise tax of $139,739.66 upon the going concern or good will value of the Delaware Company's business in Virginia, since the Company has no such intangible property in this State as to warrant the imposition of a franchise tax in that amount. The action of the Commission in this respect is therefore unconstitutional and void in that it deprives the Delaware Company of its property without due process of law and denies it the equal protection of the law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States."
>
> "5. The Commission erred in not deciding that Section 58-546 of the Code of Virginia (1950), as amended, was unconstitutional and void since it imposed a *privilege* tax on the Delaware Company's right to do solely an interstate express business in Virginia, in contravention of the commerce clause of the Constitution of the United States."

The Supreme Court of Appeals of Virginia held that the tax was not a tax on Appellant for the privilege of doing an interstate business in Virginia but a tax on the intangible property of Appellant and that the amount of the tax was properly determined in view of the value of Appellant's exclusive nationwide express privileges said to be

reflected by Appellant's gross receipts and therefore not violative of the Commerce Clause, or other clauses of the Constitution of the United States (Appendix B, App. p. 41).

THE QUESTIONS ARE SUBSTANTIAL

I.

The Tax as Applied to Appellant Violates the Commerce Clause

The first constitutional question raised on this appeal involves a determination of whether Virginia, which had for many years imposed on Appellant, doing only an interstate business in Virginia, an annual license tax of a percentage of Appellant's apportioned gross receipts, for the privilege of doing such business in Virginia, in addition to the tax levied on its intangible personal property and rolling stock, which was held to be violative of the Commerce Clause of the Federal Constitution by this Honorable Court,[2] may now without violating the Commerce Clause impose the same rate of tax on Appellant's apportioned gross receipts as a franchise tax *in lieu* of the tax on Appellant's intangible property and rolling stock?

Thus it is clear that a substantial Federal question is here raised concerning the protection afforded interstate commerce by the Commerce Clause. Unless the error of the Virginia court is promptly corrected, the courts and legislatures of the several states are free to place direct burdens on interstate commerce simply by changing the names of existing privileges taxes, or giving the required name to new privilege taxes. This case sets the pattern unless reversed by this Court. A question of public importance national in scope affecting the power of state legis-

[2] *Railway Express Agency* v. *Virginia*, 347 U. S. 359.

latures and courts over interstate commerce is thus presented.

In *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), the Court held that a Connecticut income tax assessed against an interstate motor carrier, *doing no intrastate business in Connecticut* "for the privilege of carrying on or doing business within the State," was invalid under the Commerce Clause of the Constitution of the United States because the tax was on "the privilege of engaging in interstate commerce". In the *Spector* case, this Court was only continuing its consistent practice of enforcing the protection afforded to interstate commerce by the Commerce Clause which the Court has done on innumerable occasions down through the years.

In addition to the *Spector* case and *Railway Express Agency, Inc.* v. *Commonwealth of Virginia*, 347 U. S. 359 (involving the same parties as this appeal), the following cases are further illustrative of the protection thus afforded businesses that were exclusively *interstate* in character, from state taxes upon the privilege of conducting such a business: *Memphis Steam Laundry* v. *Stone*, 348 U. S. 389 (1952) (flat tax per truck, which state court held to be privilege tax, held invalid when assessed against interstate laundry business); *Joseph* v. *Carter & Weeks Co.*, 330 U. S. 422 (1947) (privilege tax measured by gross receipts held invalid when assessed against interstate stevedoring company); *Freeman* v. *Hewit*, 329 U. S. 249 (1946) (gross income tax on sale of securities in interstate commerce by resident held invalid); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944) (state sales tax levied on foreign corporation doing exclusively interstate business in state held invalid); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (1925) (tax assessed against interstate pipe line company, which state court held to be a privilege tax, held in-

valid when measured by percentage of capital stock and surplus); and *Alpha Portland Cement* v. *Massachusetts*, 268 U. S. 203 (1925) (tax assessed against foreign corporation which state court held was excise tax, held invalid when measured by percentages of "corporate excess" and net income).

Unless the Virginia Court is correct in labeling § 58-546 as a property tax its decision clearly conflicts with these decisions. Where constitutional issues are involved, this Court is not bound by the label placed upon a state statute by a state court, or a legislative body, or by the descriptive words which such a court or legislative body has applied to the statute, but decides for itself the character of the tax.

In *Railway Express Agency* v. *Virginia, supra*, this Honorable Court said in this connection:

> "While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value, including going-concern value, and prohibited taxation of gross receipts from interstate commerce, 'neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect,' *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 227, in which inquiry 'we are concerned only with its practical operation.' *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280. See *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443-444." (p. 363)

In *Wisconsin* v. *J. C. Penney Co., supra*, it was stated, "But the descriptive pigeonhole into which a state court puts a tax is of no moment in considering the constitutional significance of the exaction" (p. 443). See also *Wagner* v. *City of Covington*, 251 U. S. 95 (1919), *Storaasli* v. *Min-*

nesota, 283 U. S. 57 (1931) and *McLeod* v. *Dilworth Co., supra.*

While the Virginia Commission has decided that the tax imposed by Section 58-546 is a tax upon the intangible *property* of Appellant *represented by the going concern value of its interstate business in Virginia,* and is levied *in lieu* of state taxes on the Company's other intangible property and rolling stock, the *amount* of such tax is determined under Section 58-547 which provides that it "shall be equal to two and three-twentieths per cent of the gross receipts derived from operations in this State."

The Virginia Commission did not determine the *amount* or *value* of such intangible property *in lieu* of which such tax upon gross receipts is imposed, and there is therefore no amount—expressed in dollars—specifically appearing in the record from which it can be determined *what* the Virginia Commission found to be the going concern *value* of Appellant's business in Virginia. Its failure to so find is explained by its own action, in imposing the tax upon "Gross receipts to be taxed" in the amount of $6,499,519.

The tax is therefore levied *in direct proportion to the extent to which the Virginia Commission has found that the privilege of carrying on the Company's interstate business is exercised in Virginia. The tax has no relation to the value (net profits) produced by the conduct of that interstate business.* Since the tax must be paid regardless of whether the operations of the Company produce *value* by operating at a profit, or produce *no value by operating at a loss, it is necessarily on the privilege of doing an interstate express business and nothing else. New Jersey Bell Telephone Co.* v. *New Jersey,* 280 U. S. 338 (1930); *Ohio Tax Cases,* 232 U. S. 576 (1914); *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298 (1912); *American Barge Line Co. v. Koontz,* 68 S. W. (2d) 56 (W. Va. 1951).

If it were a tax on the *value* produced by the exercise of the privilege and therefore a property tax, the statute should have provided that it was to be levied on the *net* profits and not on the gross receipts of the Express Company. Earnings after expenses and other charges, and not gross receipts, measure the *value* of property produced from the exercise of a privilege, or the conduct of a business.

As was said by this Court on the prior appeal in *Railway Express Agency* v. *Virginia, supra:*

> ". . . But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local, physical property. The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. *But we have declined to regard mere gross receipts as a sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume.* Cf. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328-329." (Italics supplied)

See also *Southern Railway Company* v. *Kentucky*, 274 U. S. 76 (1927).

The foregoing authorities fully support the position that the tax imposed by §58-546 is a *privilege* tax and not a *property* tax.

The "Standard Express Operations Agreement" between Appellant and the railroads, steamship lines and airlines over the lines of which Appellant transports express matter, leaves the Company "no net taxable income", since all of its revenue except operating expenses and fixed charges is paid

over to such corporations as compensation for the "privilege" accorded the Appellant under the agreement for transporting express matter over their respective lines. The revenue thus received by the railroads is, to the extent apportioned to Virginia, subject to taxation under Section 58-519 as a part of the gross receipts of the railroad companies doing business in Virginia.

The basic error of the Virginia Commission and the Virginia Court in characterizing the present "franchise" tax as a "property" tax lies in the failure to recognize the fundamental distinction between net income and gross profits. This is the same error that this Court held the Virginia court made previously in classifying the former "license" tax a "property" tax. The same principles apply to the tax presently imposed by Section 58-546 as a *franchise* tax as this Court held applicable to the former *license* tax (347 U. S. 359). Looking through labels, *the difference is in name only, not in the practical operation of the tax.*

The gross receipts earned by the business of Appellant in Virginia would be a proper measure of the exercise of the *privilege* of doing its interstate business in Virginia *if that privilege were lawfully taxable by this State.* It measures nothing else. It is a proper measure of what the General Assembly had in mind when it formerly levied a *license* tax upon Express Companies for the *privilege of doing business in Virginia.* But because of the action of the State itself in refusing to permit Appellant to carry on in Virginia any *intrastate* commerce, that license tax was held invalid by this Court since it was found to be a tax on the privilege of engaging solely in interstate commerce. *Substance cannot be ignored and the tax validly given a new name merely to avoid its adverse economic consequence to the Commonwealth.* Characterization of the tax as a property tax by

the General Assembly in 1956 is an obvious resort to form, since a *property* tax classification was necessary to support the right of the Commonwealth to levy such a tax.

The decision of the Virginia Court has failed to recognize the limits placed by the Commerce Clause on the power of states to tax interstate commerce and has permitted a direct burden on interstate commerce by misconstruing Section 58-547 to be a property tax. There is no question as to Appellant being engaged solely and exclusively in interstate commerce in Virginia and we believe that the question involving the Commerce Clause presented by this appeal is substantial and of considerable public importance fully justifying review by this Court.

II.

If a Property Tax, It Deprives Appellant of Its Property Without Due Process of Law

The tax of which Appellant complained when previously before this Court[3] had been assessed by the Virginia Commission as a *license* tax measured by a percentage of its gross receipts pursuant to a predetermined formula but no question was then raised as to the *amount* of the tax, the only issue presented to this Court being its validity under the Commerce Clause. In the instant case, however, there is also the issue of whether the amount of the tax and the manner in which it was assessed by the Virginia Commission raises a question of due process of law.

Because Appellant had no way of determining and was therefore unable to report for taxation the amount of its gross receipts earned "in business passing through, into or

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[3] *Railway Express Agency, Incorporated* v. *Commonwealth*, 347 U. S. 359.

out of" Virginia, as required by § 58-547 of the Virginia Code, the Virginia Commission undertook to determine this by means of a complex formula pursuant to which there was applied to Appellant's total system gross receipts a factor equal to the proportion which the mileage in Virginia of the major railroads and airlines over which express is shipped by Appellant bears to the total mileage of such carriers. The result was so manifestly arbitrary and unreasonable as to amount to a denial of due process. Applying the factor thus determined, the Virginia Commission assigned to Virginia for tax purposes $6,499,519 of Appellant's total gross revenue in 1956 of $387,241,764. The Virginia portion amounted to 1.7% of total gross revenue. The unreasonableness of this apportionment becomes apparent when it is observed that of Appellant's total assets of like class as those located in Virginia of $79,700,426, only $475,665, or less than 0.6% was situated in this State in 1956.

Appellee contends and the Virginia Court held that the subject of this tax is the *going concern* or *use value* of Appellant's tangible assets—an added value which results from the utilization of these assets in a nationwide express business—and that gross receipts is a fair measure of such value (Appendix B, App. pp. 31-33).

But going concern or use value must be regarded as spread among the various states in the proportions in which the tangible assets are distributed. No mileage formula or other device may be used to ascribe to one state a disproportionate part of the value of an interstate system. *Fargo* v. *Hart*, 193 U. S. 490 (1904); *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298 (1912); *Illinois Central R. R. Co.* v. *Greene*, 244 U. S. 555 (1917). Yet this is precisely what the Commission has done and the Virginia court approved. It has ascribed to Virginia, where only 0.6% of Appellant's prop-

erty is located, gross receipts amounting to 1.7% of Appellant's total gross revenue and, consequently, the same proportion of the total going concern value of all the Express Company's assets. *In effect, the Commission has declared and the Virginia Court has held that Appellant's property in Virginia is proportionately almost three times more productive of revenue than all its other assets wherever located* and *that therefore this property has a going concern value three times greater than its similar property located anywhere else in the nation. There is clearly no basis for any such unrealistic claim.*

By means of this unfair apportionment Virginia has succeeded in taxing property of the Express Company located outside Virginia. *The illegality of an apportionment formula which has this effect is not altered or excused by the fact that Appellant was unable to supply a fairer means of apportionment.* It is for the Virginia legislature, not the Express Company, to devise some fair means of determining what proportion, if any, of the going concern value of the taxpayer's property can fairly be ascribed to its tangible property located in Virginia.

Apart from the unfair apportionment formula by which it was assessed, the *amount* of the tax is indicative of its illegality. Section 58-546 of the Virginia Code declares that the tax shall be *in lieu* of taxes upon all the "other intangible property" and "rolling stock" of express companies. This Court has frequently stated that such an *in lieu* tax, however determined, will be upheld only *if it does not exceed the amount of the ordinary property tax in lieu of which such tax is imposed.* See, *Postal Telegraph Cable Company* v. *Adams*, 155 U. S. 688, 696 (1894); *Cudahy Packing Company* v. *Minnesota*, 246 U. S. 450, 453 (1917); *Pullman* v. *Richardson*, 261 U. S. 330, 338-339 (1922).

Under Virginia's system of segregation of property for

State and local taxation,[4] the only property of the Appellant in Virginia which the state (as distinguished from localities) might have taxed was $120,110.70 of *cash on deposit* which, at the ordinary rate applied to other taxpayers, would have produced a tax of $252.21 and Appellant's "rolling stock" which would have produced a tax of $427.50, a total tax of $679.71. *Plainly the franchise tax of $139,739.66 was no "just equivalent" of this tax at ordinary rates.*

Of course this comparison allows for no enhancement of value of such property because of its use as a going concern. But money has no going concern value; it will buy only so much in goods or services whether used by a successful business or one which has no good will.[5] And even if all of Appellant's property in Virginia, except money, *including tangible property and real estate which the state, under its system of segregation of property for state and local taxation, is forbidden to tax*, is taken into consideration, the total value of *such* property ($325,555) certainly cannot be said to have a going concern value of $27,947,932 which would be the value necessary to produce a tax of $139,739.66 *at the ordinary rate of tax on intangibles (.50¢ per $100 of value).*

Because the tax imposed so grossly exceeds what would be the tax at ordinary rates on Appellant's property in Virginia even when valued as part of a going concern, it cannot be regarded as a valid *in lieu* tax, but obviously reaches Appellant's property located outside Virginia and is therefore invalid.

These considerations make it plain that there is a substantial question as to the validity of this tax under the due process clause of the Fourteenth Amendment which ought to be considered and reviewed by this Court.

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[4] Constitution § 171, Virginia Code § 58-95.

[5] *Railway Express Agency* v. *Virginia, supra*, p. 365.

CONCLUSION

Since there is no question as to Appellant being engaged solely and exclusively in interstate commerce in Virginia, it is believed that the two questions presented by this appeal are not only substantial but of considerable public importance and fully justify a review by this Honorable Court.

Respectfully submitted,

ROBERT J. FLETCHER
THOMAS B. GAY
WILLIAM H. WALDROP, JR.
H. MERRILL PASCO
Counsel for Appellant

HUNTON, WILLIAMS, GAY,
MOORE & POWELL
1003 Electric Building
Richmond, Virginia
Of Counsel for Appellant

APPENDIX A

Opinion of State Corporation Commission of Virginia

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

March 1, 1957

Application of
RAILWAY EXPRESS AGENCY, INCORPORATED

Case No. 13233

For refund of 1956 Franchise Tax.

Opinion, CATTERALL, *Chairman.*

For many years Railway Express paid its Virginia franchise tax under protest, but it took no steps to resist the tax until after the Supreme Court had announced its decision in the case of *Spector Motor Service* v. *O'Connor*, 340 U. S. 602. Inspired by the decision in that case, it petitioned for a refund and won in the Supreme Court by a vote of 5 to 4 in *Railway Express Agency* v. *Virginia*, 347 U. S. 359. The result was a substantial windfall for the Express Company at the expense of the State of Virginia. The dissenting opinion pointed out (p. 371):

> "As a result of the immunity given by today's decision, appellant and others similarly situated receive a windfall in the form of a valid claim for tax refunds extending back as far as limitations will permit. This is the result of today's twist to the Spector doctrine * * * This approach is rather hard on the states and creates additional obstacles for them in their continuing effort to make purely interstate business units pay a fair share of the cost of state facilities and services essential to the functioning of these enterprises."

The court's decision cost the state about $600,000 in taxes; and the General Assembly at its next session passed the statute now under attack. The new statute makes two changes in the law designed to overcome objections based on the commerce clause of the federal constitution. The new statute, instead of calling the tax a privilege tax, describes it as a property tax. The new tax, which is a tax on the going concern value of the business, is imposed in lieu of certain other property taxes.

Evidence was taken on December 17, 1956. Thereafter, briefs were filed and oral argument was presented. Thomas B. Gay and H. Merrill Pasco appeared for the taxpayer. Frederick T. Gray, by special appointment by the Attorney General, appeared for the Commonwealth; and Norman S. Elliott for the Commission.

Although the words of the Constitution to be construed in this case are few and simple, they have given rise to much controversy and misunderstanding. Those words are:

> "The Congress shall have Power * * * To regulate Commerce * * * among the several States, * * *"

At first blush, it is hard to see how those words could have any bearing on this case. The words confer power on Congress; and Congress has passed no law that could apply here. The words do not purport to limit the powers of the states; and, when we examine the Constitution as a whole, we find that when the Framers meant to restrict the rights of the states they used express language to say so. By following that practice, they manifested their understanding that conferring a power on Congress did not *ipso facto* deny it to the states. For example, the Constitution gives Congress power to coin money, to declare war and to raise armies. It gives the President power to make treaties.

The Framers thought that that alone would not operate to keep the states from coining money, declaring war, raising armies and making treaties. They considered it necessary to add:

> "No state shall enter into any Treaty, * * * coin Money; * * *
> "No State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace * * * or engage in War * * *"

Granting to Congress the power to lay and collect taxes and to borrow money did not keep the states from doing the same thing. Giving Congress the power to pass "uniform Laws on the subject of Bankruptcies" did not automatically deprive the states of power to pass bankruptcy laws. *Butler* v. *Goreley*, 146 U. S. 303, 36 L. ed. 981. Only the Commerce Clause has been given this peculiar interpretation. It alone diminishes the rights of the states without saying so. In all other instances state laws are valid unless they conflict with an affirmative prohibition in the Constitution or a constitutional Act of Congress.

How did this peculiar situation come about?

In *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23, Daniel Webster argued (p. 13):

> "He contended, therefore, that the people intended, in establishing the constitution, to transfer, from the several states to a general government, those high and important powers over commerce, which, in their exercise, were to maintain an uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several states, respectively, but the com-

merce of the United States. Henceforth, the commerce of the states was to be an unit; and the system by which it was to exist and be governed, must necessarily be complete, entire and uniform. Its character was to be described in the flag which waved over it, *E Pluribus Unum*. Now, how could individual states assert a right of concurrent legislation, in a case of this sort without manifest encroachment and confusion. It should be repeated that the words used in the constitution; 'to regulate commerce' are so very general and extensive that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires."

And Chief Justice Marshall agreed with him (p. 209):

"It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

"There is great force in this argument, and the court is not satisfied that it has been refuted."

All that counsel and the court said on that interesting subject was unnecessary to the decision, because Gibbons had a federal license duly issued under an Act of Congress with which the state statute conflicted.

Brown v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678, involved the clause of the Constitution which forbids the states in express terms to "lay any imposts or duties on imports." Chief Justice Marshall used the occasion to expand his theory of the self-executing effect of the Commerce Clause by asserting that there is no difference between interfering with a regulation made by Congress and interfering with the power of Congress to make the regulation.

At page 448, speaking of state duties on imports he says:

> "It is too obvious for controversy, that they interfere equally with the power to regulate commerce."

And:

> "We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce."

The fallacy of what the Chief Justice maintains ought to be "too obvious for controversy". A state law in conflict with a valid federal regulation is of course void. For that very reason, a state law that does *not* conflict with any federal regulation, could not possibly interfere with the *power* of Congress to regulate.

These dicta of the great Chief Justice are the little acorns from which have grown the impenetrable forest of decisions on the question of when the states may or may not tax or regulate interstate commerce. For the rule is not absolute. Webster, in his argument quoted above, pointed out that, in the nature of things, the rule could not be absolute. The correct statement of the rule we are considering is: "Sometimes, the states may not regulate or tax commerce among the states."

The Framers of the Constitution *did* not, and must have seen that they *could* not, impose a blanket prohibition against

state regulation of interstate commerce. At that time the only law that regulated interstate commerce was state law. To abolish that law overnight by constitutional mandate would have left the whole field without law until Congress got around to legislating on it. It is quite true, as Marshall repeatedly points out, that the main reason for junking the Articles of Confederation was to confer on the central government the power to regulate interstate and foreign commerce. The Constitutional Convention solved the problem by giving Congress the power to regulate. Where regulation was needed, Congress was to adopt regulations. Until Congress acted, state regulations were to remain in full force and effect. That plan was not good enough for Webster and Marshall, and they worked out something better.

In staking out the line dividing the field in which the states were free to regulate from the field in which they were forbidden to regulate, the court, of course, had to take each case as it came up, but felt obliged to lay down a general principle to explain what it was doing. That statement of principle, in *Cooley* v. *The Port Wardens,* 12 How. 299, 13 L. ed. 996, was (p. 319):

> "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

The court has had occasion to quote that sentence many times. Sometimes, however, it varied one of the words in the quotation, and the change of that one word greatly changed the meaning of the quotation. For example, in the *State Freight Tax Case,* 15 Wall. 232, 21 L. ed. 146, the court expressed the view that the rule in *Cooley* was clear, saying:

"However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."

It will be observed that the word *"only"* has been dropped from the declaration of the governing principle. The difference between the two methods of stating this cardinal rule of constitutional interpretation is almost as great as the difference between night and day. The omission of the word "only" after the word "admit" makes a big change in the meaning; and the most striking thing about the change is that the court did not notice that it had made a change. It was as if the court was under the mistaken impression that the sentence: "I eat spinach," means the same thing as: "I eat only spinach."

The contrast between the two methods of stating what the court considered to be the same thing is brought out by observing that practically everything *admits* of one uniform system of regulation and practically nothing *admits only* of one uniform system of regulation. The most conspicuous example of a regulation that, by absolute necessity, must be uniform throughout the United States, is the rule that motor vehicles travelling in commerce must pass each other on the right. If they passed on the right in Maine, on the left in New Hampshire, on the right in Massachusetts, on the left in Rhode Island, and so on down the coast, the consequences would be too awful to contemplate. Here, if anywhere, the court could be sure that the subject is in its nature national and admits only of one uniform system or plan of regulation; but the court has not forbidden the states to regulate

this part of interstate commerce during the silence of Congress.

Thus it appears that this supposed rule that "has been asserted with great clearness" is not very clear and is not even a rule. There can be no disputing the court's pronouncement in *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 420, that

> ". . . the history of the commerce clause has been one of very considerable judicial oscillation."

In *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 89 L. ed. 1915, we find the court debating the policy question of whether it is better to endanger the lives of brakemen on freight trains or of motorists at grade crossings. The brakemen lost, and Mr. Justice Black was moved to remark (p. 788):

> ". . . this Court to-day is acting as a 'super-legislature.'"

In *Morgan* v. *Virginia*, 328 U. S. 373, 90 L. ed. 1317, he said (concurring at page 386):

> "The Commerce Clause of the Constitution provides that 'Congress shall have power . . . to regulate commerce . . . among the several States.' I have believed, and still believe that this provision means that Congress can regulate commerce and that the courts cannot. But in a series of cases decided in recent years this Court over my protest has held that the Commerce Clause justifies this Court in nullifying state legislation which this Court concludes imposes an 'undue burden' on interstate commerce. I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress."

The unenviable situation of an inferior court in deciding cases involving state regulation and taxation of interstate commerce is that it frequently cannot tell which way the Supreme Court will oscillate next. For, after all, it is not the last decision of the Supreme Court that governs the pending case, but the next decision; and the outcome of these commerce clause cases turns not on any rule of law but on how the facts of each particular case impress a majority of the Justices. In *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. ed. 757, a bare majority of the court reached the conclusion that the Virginia tax on the express company was too heavy a burden on interstate commerce.

The peculiar feature of this case is that the Railway Express Agency *does no intrastate business in Virginia.* It does both kinds of business in all the other states. If it had done any intrastate business in Virginia, the decision would have gone the other way. If the case had come up from any state but Virginia, a statute in the same words as the Virginia statute would have been held constitutional. If the taxpayer had done $10 worth of business intrastate in Virginia, it would have had to pay the tax on all its interstate business in Virginia, although the burden on interstate commerce would have been the same in both cases. When we remember that it is a constitution we are construing, and when we observe that the dividing line between what the states may and may not do is drawn by the judges on considerations of policy by balancing the national interest in free movement against the local interest in regulating local affairs, it is wonderful that so fine and technical a line could be drawn: a line that bears no relation to the supposed reason for drawing a line.

The unbelievably narrow line separating a good statute

from a bad one is illustrated by comparing the *Railway Express* case with the *Steamboat* cases. The Virginia statute imposing a gross receipts tax on steamboat companies was almost word for word the same as the Virginia statute imposing a gross receipts tax on express companies. There was no material difference in the law, and the only significant difference in the facts was that the steamboat companies did a little intrastate business. In the *Steamboat* cases the Supreme Court dismissed without opinion the appeal from the Supreme Court of Appeals of Virginia. In *Railway Express Agency* v. *Virginia*, 347 U. S. 359, the court explained the difference between the *Express Company* case and the *Steamboat* cases as follows (p. 368):

> "The Supreme Court of Appeals placed reliance upon our dismissal of the appeals in Baltimore Steam Packet Co. v. Virginia, 343 US 923, 96 L ed 1335, 72 S Ct 763, and Norfolk B. & C. Line, Inc. v. Virginia, 343 US 923, 96 L ed 1335, 72 S Ct 764, and may well have been misled, since we assigned no reasons and cited no authority. In those cases, the Virginia court held an almost identical tax to be a property tax. Commonwealth v. Baltimore Steam Packet Co., 193 Va 55, 68 SE2d 137. But a vital distinction, so far as our jurisdiction is concerned, will account for dismissal of the appeals. One of those appellants was a Virginia corporation and derived its privilege to exist from that State. Both were engaged in intrastate as well as interstate commerce and were therefore subject to some privilege tax from the State. For our purposes, it mattered not whether the right to tax was based on those companies' privileges or on their property, since they were taxable on either basis. This fact distinguishes those dismissed cases from the one at bar and from Spector Motor Service, Inc. v. O'Connor, 340 US 602, 95 L ed 573, 71 S Ct 508, supra."

"A vital distinction," as that phrase is used by the court, means a distinction that makes the difference between constitutionality and unconstitutionality. That vital distinction, says the court, is: "One of those appellants was a Virginia corporation * * * Both were engaged in intrastate as well as interstate commerce * * * "

Apparently there were two vital distinctions. The Norfolk, Baltimore and Carolina Line was a Virginia corporation. If that be a vital distinction between it and Railway Express Agency, the holding of the court is that if Railway Express Agency had been a Virginia corporation it would have had to pay the tax. But the burden on interstate commerce is exactly the same whether the taxpayer is incorporated in Delaware or in Virginia.

That distinction did not exist in the case of the Baltimore Steam Packet Company. The taxpayer, like Railway Express Agency, was a foreign corporation. Consequently, the only difference between those two corporations was that Baltimore Steam Packet Company did a little intrastate business in Virginia.

In the *Baltimore Steam Packet* case the tax on gross receipts was computed on the fraction of total receipts that the miles travelled in Virginia bore to the total miles travelled. Under that allocation, the gross receipts earned in Virginia from both kinds of business was $1,158,000. Of that amount the gross receipts from transportation intrastate between Virginia ports was $2,287. The tax on the allocated interstate receipts was $18,981.20. The tax on the intrastate receipts was $34.31. So the vital distinction, the difference between good and bad, is that the Steamboat Company must pay on all earnings derived from operations within the geographical boundaries of Virginia, because, and only because, *one-fifth of one per cent* of those operations involved movement from one point to another within

those boundaries. Because it had those *gross* receipts of $2,287 (from which the net earnings, if any, can not have been much) it was required by the Supreme Court of the United States to pay a tax of $19,000. It so happened that the tax held constitutional was 800% of the gross income that alone served to make it constitutional. That was not a borderline case. It was such a clear case that the Supreme Court dismissed the appeal without wasting time on oral argument. There can be no constitutional difference between $2,287.00 and $2.28 unless the court is prepared to draw a new line and declare that what the Framers really meant when they gave Congress power to regulate commerce was that a state tax on the privilege of engaging in interstate commerce is valid if the taxpayer does intrastate business of $2,287 but void if its gross intrastate earnings are only $2,286.

The "vital distinction" relied on by the Supreme Court to distinguish the *Baltimore Steam Packet* case from the *Railway Express* case was that one foreign corporation had no gross earnings in Virginia intrastate business and the other had $2,287 of such earnings. On that basis alone the two cases look pretty much alike. Actually, however, when all the facts of both cases are considered, they are even more alike. It is true that the express company does no intrastate business in Virginia; but it owns all the stock of a subsidiary Virginia corporation that does do business in Virginia; and the gross receipts of that subsidiary are more than $2,287. The steamship company did all its business, interstate and intrastate, in the same steamboats manned by the same crews. The two express companies do all their business, interstate and intrastate, in the same trucks operated by the same drivers. The net earnings of Railway Express Agency of Virginia go into the pocket of the parent company, the Delaware corporation. Looking at the physi-

cal aspects of the express business and of the steamship business no relevant differences can be perceived by the naked eye. The only difference left, when all the facts are considered, is that the steamship company earned the fatal 2,287 intrastate dollars through servants employed by it; and the two express companies earned more than 2,287 intrastate dollars through servants employed by them jointly. The express business is one business carried on by two corporations, one of which owns the other.

The court's opinion in *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, begins with the lament:

> "This appeal from the Supreme Court of Appeals of Virginia presents another variation in the seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them."

The states have to collect taxes if they are to continue to exist as members of this indissoluble union of indestructible states, and, since most commerce is interstate commerce they have to make interstate commerce pay its way. The federal government, through its duly constituted legislative body, has practically absorbed the field of income taxes, and through its supreme judicial body has restricted other sources of state tax revenue. The duty of self preservation forces the states to press against the barriers erected by the Supreme Court, and so long as those barriers are endlessly shifting the problems will continue to be endless. The problems are endless because the superstructure erected by the court on Marshall's dicta is not based on logic. If the first premise of an argument is not logical nothing that follows can be entirely satisfying. The most striking example of this occurs in the court's unsuccessful efforts to explain how it happens that an Act of Congress can confer on the states powers that the Constitution forbids them to

exercise. If it were true that the Commerce Clause, by its own unaided force and effect, forbids the states to regulate insurance, Congress could no more authorize the states to regulate the insurance business (*Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408) than it could authorize them to pass bills of attainder. The only way out of this logical dead end is to recognize that it is not the constitution but the court that forbids the states to regulate and tax interstate commerce in fields not occupied by any Act of Congress. The key to the riddle is the first line of Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States."

No friend of states rights could be optimistic enough to expect the court to give up the power it has so long exercised of striking down state laws that, in its judgment, go too far in taxing interstate commerce. The most that can be seriously hoped for is that the court will decide close cases in favor of the states. The burden of the argument up to this point is that, if the Virginia tax on steamship lines was obviously valid, the old Virginia tax on express companies, which differed by less than a hair's breadth from the Virginia tax on steamship lines, was almost obviously valid. If the steamship tax was clearly valid, the express company tax could not be void beyond a reasonable doubt, and *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, ought to be overruled.

The remainder of this opinion will deal with the two changes made by the 1956 statute. The first change was to bring the state legislature in line with the state court in treating this tax as a tax on property.

The fatal defect in the Virginia statute held unconstitutional in *Railway Express Agency* was that five Justices found that the tax was on a privilege and not on property. The manner in which the five Justices dealt with the tax is

accurately described by the four Justices who dissented (347 U. S. 370):

"The Supreme Court of Appeals of Virginia has held that the instant tax is an ad valorem tax on intangible property; the 'operating incidence' of the tax has been labeled the 'going concern' value of appellant's physical assets in Virginia. The state court specifically held that the tax 'is not a tax upon the privilege of carrying on a business exclusively interstate in character . . .' 194 Va 757, 760, 761, 75 SE2d 61. Hence, if we accept the determination of the state court, there is little question but that the tax is valid even under Spector.

"This Court, however, refuses to accept the Virginia court's determination and assigns to the Virginia tax the same 'privilege' label that condemned the tax in Spector. Although the Court refused to pierce the label in Spector, I do not dispute its right to re-examine a label affixed by a state court. In some cases the label may be wholly inconsistent with the state's taxing scheme; or it may be true—though I doubt it—that a state court might deliberately misbrand a tax to avoid decisions of this Court. But neither fact justifies the Court's refusal to accept the determination of the state court in this case. The name given the tax by the Virginia court meshes with the state's taxing scheme. And I do not believe that the Virginia court deliberately mislabeled the tax. Indeed, the holding of the state court is perfectly consistent with its earlier expressions on the subject and those of the State Corporation Commission, some antedating Spector. Commonwealth v. Baltimore Steam Packet Co. 193 Va 55, 68 SE2d 137 (1951), app dismd 343 US 923, 96 L ed 1335, 72 S Ct 763, 764 (1952); Richmond v. Commonwealth, 188 Va 600, 50 SE2d 654 (1948). Moreover, this Court does not question the existence of a going-concern value aside from the value of a business unit's physical assets."

Beginning with railroads in 1902, when its present constitution was adopted, it has been the policy of Virginia to impose gross receipts taxes instead of income taxes on public utilities. From the beginning those taxes have been looked on as property taxes no matter what they were called.

Sec. 177 of the Virginia Constitution imposes "an annual State franchise tax" on railroads measured by gross receipts "for the privilege of exercising its franchise in this State, . . ."

Sec. 178 allocates the tax on interstate railroads:

> "By ascertaining the average gross transportation receipts per mile over its whole extent, within and without this State, and multiplying the result by the number of miles operated within this State; provided that from the sum so ascertained there may be a reasonable deduction because of any excess of value of the terminal facilities or other similar advantages in other states over similar facilities or advantages in this State."

If the tax were not a tax on property there could be no reason to adjust the tax when the value of out-of-state terminals so exceeded the value of in-state terminals as to indicate that the relationship of in-state mileage to out-of-state mileage was not a fair test of relative property values.

Sec. 170 says:

> "The General Assembly . . . may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property. . . ."

If a franchise tax were not a tax on property it could not be imposed in lieu of a tax on *"other"* property. Although

franchise taxes were *called* taxes on a privilege, they in fact were considered to be, and were, property taxes.

This system of taxing railroads, later extended to other public utilities, was presented to the Virginia Constitutional Convention of 1902 as a tax on property. The constitution itself (Sec. 177) imposed the tax on railroads. The taxes on other companies were left to the legislature. In explaining the proposed system to the Convention, Mr. C. V. Meredith, presenting the report of the Committee on Taxation and Finance, said at page 2857 of the Debates:

> "It is true that there is a difference between a tax upon a franchise and a tax upon capital. A franchise tax may embrace all the capital or it may embrace only a portion of it. The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at;"
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> * * *
>
> "I call your attention to the fact that it is our desire and hope that the Legislature will see fit to levy a system of franchise taxes by which the entire property of a corporation will be gotten at, and that it will levy a tax on the entire property. If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. Why? You know that a share of stock is not a debt. There is nobody from whom you can collect it. You are entitled to no interest on it. It is simply your title deed to your share in the corporation. It simply

> represents the interest which you have in this property which we propose to tax under the franchise system, if the Legislature does its duty, which we suppose it will."

Great Northern Railway Co. v. *Minnesota*, 278 U. S. 503, involved a gross receipts tax on railroads. The tax on interstate receipts was imposed "in proportion which the mileage within the state bears to the entire mileage of the railway over which such interstate business is done."

The court said (p. 507):

> "The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state."

If a tax on the gross receipts of a railroad is a property tax, it would seem to follow that a tax on the gross receipts of an express company would be a property tax. And if it *is* a property tax it ought to remain a property tax no matter what it is called. However, five Justices of the Supreme Court have held that the old Virginia tax on express companies was a privilege tax. The last sentence of the opinion of the four dissenting Justices is (347 U. S. 372):

> "The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval."

The Virginia legislature, in passing the new law, has not only used the tax language most likely to meet the court's approval, but has made the new tax in lieu of other property taxes. Sec. 171 of the Virginia constitution provides:

> "No State property tax for State purposes shall be levied on real estate or tangible personal property, except the rolling stock of public service corporations. Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed or re-assessed for local taxation in such manner and at such times as the General Assembly has heretofore prescribed, or may hereafter prescribe, by general laws."

Local taxes on the real and tangible property of railroads, express companies and other utilities are levied by the localities on the basis of assessments made by the State Corporation Commission. In making the assessments the Commission considers only the value of the physical property, its bare bones value without any going concern value, because the going concern value is intangible property subject to taxation by the state and not by the locality. Because of the known propensity of local taxing authorities to combine low assessments with high rates, this Commission, for the protection of the utilities, assesses the physical property of state-wide utilities at 40% of its appraised value. The City of Richmond, claiming that this method of 40% assessment was unfair to it, appealed to the Supreme Court of Appeals of Virginia. *Richmond* v. *Commonwealth*, 188 Va. 600, explains and upholds this method of assessment.

Sec. 171 of the Constitution, quoted above, permits the state to tax "the rolling stock of public service corporations." In the case of a public service corporation like an express company its rolling stock consists mainly of motor vehicles. The property tax on the automotive equipment of motor vehicle common carriers is assessed by the Commission under §§ 58-618 to 58-626.1 of the Code of Virginia. The history and interpretation of that tax are given in *East Coast Freight Lines* v. *Richmond*, 194 Va. 517.

Counsel for the express company argues that § 58-9 of the Code of Virginia permits the localities to tax the express company's motor vehicles and that the 1956 franchise tax on express companies should not be construed to change that result by making the state franchise tax in lieu of that local property tax. The constitution of Virginia does not segregate the rolling stock of any public service corporation to either state or local taxation. The express language of § 58-546 makes the franchise tax on express companies "in lieu of property taxes on its rolling stock." There can be no doubt that § 58-546 supersedes the part of § 58-9 relied on by counsel. In *East Coast Freight Lines* v. *Richmond*, 194 Va. 517 at 524 the Court said:

> "We concur in the opinion of the trial judge, 'that rolling stock of public service corporations is not the subject of any constitutional segregation,' and that no statutory segregation of rolling stock of a corporation of the character of the appellant has been pointed out. The only statutory segregation provided is that contained in § 58-9, Code of 1950, which segregates the rolling stock of railroads operated by steam, and § 58-624, which is, as we have pointed out, inapplicable to appellant because of § 58-626.1."

Next, counsel for the taxpayer argues that a tax on the intangible going concern value of a business cannot exceed a small fraction of the value of the physical property used in the business; and says that the tax in the present case is not a small fraction but a big one. But the going concern value of a business depends on the value of the business as a going concern and not on the value of the land, machinery, equipment and tools used in the business. In *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. ed. 965, the court said:

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man."

* * *

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

In the case before us the Delaware company would have the same business it has now even if it did not own a penny's worth of tangible property in Virginia. The Delaware Company owns all the stock of the Virginia Company. The two companies do all their business in the same places in

the same vehicles with the same employees. If the parent company should transfer title to all the property used in the business to the local company, it would own no tangible property in Virginia but the going concern value of the business would not be affected in any way. The Railway Express Agency is the only big business in America that has an absolute nationwide monopoly. Counsel says that this vast monopoly has no going concern value because all its earnings go to the railroads who own it. Railway Express Agency was incorporated by the railroads and owns the monopoly as a separate entity, and it is taxable as a separate entity like any other corporation. Such a monopoly built up over the years by the expenditure of millions of dollars is not the sort of property that is bought and sold in the market place, but it is nevertheless a thing of great value. It is a unique kind of property, but the fact that it is unique is not a reason for holding it to be exempt from taxation. The fact that the value of that unique property cannot be appraised in dollars and cents like a piece of real estate is a reason for measuring the tax by gross receipts. In our opinion the tax is constitutional and the application for a refund is denied.

HOOKER and KING, *Commissioners*, concur.

APPENDIX B

Opinion of Supreme Court of Appeals of Virginia

In the

Supreme Court of Appeals of Virginia

RECORD NO. 4742

RAILWAY EXPRESS AGENCY, INCORPORATED

v.

COMMONWEALTH OF VIRGINIA

FROM THE STATE CORPORATION COMMISSION

OPINION BY JUSTICE ARCHIBALD C. BUCHANAN

Richmond, Virginia, December 2, 1957

Present: All the Justices.

This is an appeal from an order of the State Corporation Commission which denied the application of the appellant made under § 58-672 of the Code for correction and refund of the franchise tax assessed against it by the Commission for the year 1956, pursuant to amended Article 4, Chapter 12, Title 58, § 58-546 through § 58-555 of the Code, as amended by Acts 1956, ch. 612, p. 964. The Code sections material to this controversy appear below.[1] In its opinion

[1] "§ 58-546. Franchise tax on express companies. — Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be

filed in support of its order, as required by § 156(f) of the Virginia Constitution, the Commission held that the tax imposed by these sections was a property tax on intangible property of the appellant, in lieu of other property taxes, and not prohibited by the United States Constitution.

In its Annual Report for 1956, required by the Commission pursuant to § 58-548, the appellant, in response to the inquiry on the form furnished it by the Commission as to

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in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

"§ 58-547. Amount of franchise tax. — The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State."

"§ 58-548. Annual report. — Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding."

"§ 58-549. Assessments by Commission. — The Commission shall, after thirty days' notice previously given by it to the company, assess the franchise tax and the value of the real estate and tangible personal property other than rolling stock. Should any company fail to make the report required by this article on or before the fifteenth day of April the Commission shall make the assessments upon the best and most reliable information that it can procure. In the execution of such duty the Commission shall be empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers."

"§ 58-553. No other taxes on express companies; exceptions.—The taxes imposed by this article and authorized to be imposed shall be in lieu of all other taxes and of all licenses, State, county and municipal, upon such companies, except that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law, or the annual registration fee."

what receipts were by it "earned in Virginia on business passing through, into or out of this State," answered "None", and attached a statement saying, in part, "This Company does solely an interstate express business in Virginia and has no way of determining what part of the receipts derived by it from such business was earned 'in business passing through, into or out of this State'."

The Commission thereupon, as directed by § 58-549, proceeded to "make the assessments upon the best and most reliable information that it can procure". By a method of calculation shown in the record it determined the appellant's gross receipts from business passing through, into or out of Virginia by computing on a mileage basis the proportion which its receipts from express transported by it over six railroads (omitting ten others because *de minimis*) and five airlines operating in Virginia bore to the total receipts from express transported by the appellant over the entire lines of these carriers. The amount so ascertained as gross receipts earned in Virginia was $6,499,519, to which the 2.15% rate fixed by § 58-547 was applied, resulting in the tax of $139,739.66 assessed by the Commission against the appellant, of which it now complains.

The appellant, which will sometimes be referred to herein as the Delaware Company, was incorporated in Delaware in 1928, and does an express business in all of the States of the Union, interstate in all, and intrastate in all except Virginia. Because of the provision of § 163 of the Virginia Constitution it was denied a certificate to engage in intrastate express business in this State.[2] The Delaware Company has a contract with 68 railroads which own its entire

[2] *Railway Express Agency, Inc.* v. *Commonwealth*, 153 Va. 498, 150 S. E. 419, *aff'd*, 282 U. S. 440, 51 S. Ct. 201, 75 L. ed. 450.

capital stock, and 109 non-stockowning railroads which gives it the exclusive right and privilege to conduct express transportation business over their lines, including those operating in Virginia.

In 1931 the Delaware Company caused to be chartered and organized under the laws of Virginia the Railway Express Agency, Incorporated, of Virginia, for the purpose of conducting a purely intrastate express business in Virginia. The Delaware Company owns all the stock of the Virginia Company and in 1932 entered into a contract with it by which the Virginia Company agreed to conduct the intrastate business in Virginia on the lines of the railroads named by the Delaware Company, and to perform the obligations of the latter company with its contracting carriers concerning intrastate operations in Virginia. The contract provided for joint use by the two companies of real and personal property, equipment and employees.

On the hearing before the Commission it was stipulated that the Delaware Company "conducts an express business in interstate commerce and intrastate commerce in each of the states of the United States with the exception of Virginia, in which it conducts only an interstate business," and that the Virginia Company "conducts solely an intrastate business in the State of Virginia".

Under its assignments of error on this appeal the appellant contends: (1) that §170 of the Virginia Constitution does not authorize the imposition of this tax; that §58-546 does not impose it; that §58-547 provides no adequate method for determining gross receipts from interstate commerce and does not authorize the method employed by the Commission; (2) that the tax imposed is not a property tax as held by the Commission, but a tax levied upon the privilege of doing an interstate business in Virginia and hence

invalid; (3) that the Commission should not have classified appellant's automotive equipment and trucks as rolling stock; and (4) that the Commission erred in rejecting as immaterial some of appellant's offered exhibits.

First. Section 170 of the Virginia Constitution provides that the General Assembly "may impose State franchise taxes," and may "make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation". Appellant's argument is that this should be construed to mean only domestic transportation corporations and not applied to the appellant which as a foreign corporation has been denied authority to do intrastate express business in Virginia. We do not agree. Section 170 authorizes the imposition of a franchise tax on transportation companies. The appellant is a transportation company, so defined by § 153 of the Constitution. It owns property and does an interstate express business in Virginia. Section 158 of the Constitution says that all property, except as in the Constitution provided, shall be taxed. Certainly no exception of foreign transportation companies is in terms made in § 170 nor do we think that such an exception can be fairly inferred. Limitation on the power of the legislature to impose the tax would have to proceed from a prohibition in the Constitution, not from absence of conferred authority. The powers of the legislature are plenary except as restrained by the Constitution. 4 Mich. Jur., Constitutional Law, § 31, p. 114. We cannot say that our constitutional and statutory provisions were not intended to and do not apply to the appellant, as was said in *State* v. *Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549, to be true of the provisions of the Albama Constitution and laws under former decisions to the effect that a foreign corporation doing

an exclusively interstate business in Alabama does not "do any business in this state."[3]

Section 58-546 provides that "Each express company" doing business in this State shall pay a franchise tax in lieu of taxes on other intangible property and in lieu of property taxes on its rolling stock. Appellant is an express company doing business, interstate at least, in this State. Section 58-547 fixes the rate and provides that where operations are partly within and partly without the State, the gross receipts from operations in the State shall be all receipts on business beginning and ending within the State and all receipts from the transportation within this State of express transported through, into, or out of this State. Appellant argues that in order for an express company to be subject to these provisions it must do either an intrastate business, or both an intrastate and interstate business, and since it does only an interstate business the statute does not apply to it. We are not impressed by the argument. Section 58-546 describes

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[3] *Commonwealth* v. *Appalachian Elec. Power Co.*, 193 Va. 37, 68 S. E. 2d 122, not referred to in argument by either party in the present case, does not control decision here. That case involved the interpretation of § 58-602 of the Code imposing a tax on the money of "every corporation doing in this State" an electric utility business. The question was whether the legislature meant to tax the money of such corporation on deposit in another State and derived solely from and used in connection with operations in such other State. It was held that in view of the legislative history of the statute; the administrative practice, long undisturbed by the legislature, of not taxing such money; and the legislative intent expressed in cognate statutes, particularly the statute limiting the tax on money earned by railroad companies to the part earned in this State, it was not the purpose of § 58-602 to tax money earned and kept in another State. The sentence in that opinion, "Since section 163 of our Constitution forbids a foreign corporation to do a public service business in this State, the statute looks only to Virginia corporations which conduct a utility business in Virginia", is to be taken in its setting and confined to the statute there construed. It does not serve to change the meaning of the clear language and purpose of the Code sections now under review.

the corporations which must pay the tax, and § 58-547 only fixes the rate and provides how the gross receipts to which it applies shall be identified. We detect no purpose in the statute to exempt the appellant because it earns only one kind of the receipts referred to.

Section 58-547 does not undertake to prescribe the method of ascertaining the amount of these gross receipts. Sections 58-548 and 58-549 do that. The primary method is for the express company to report what these receipts are. Nobody else could as easily obtain that information. The secondary method is not needed unless the express company fails to furnish the information, which happened here. In that event the Commission is required to make the assessment on the best and most reliable information it can get. It did that by the method above stated. It is a method frequently resorted to in the fields of Federal and State taxation and doubtless necessary in the administration of tax laws. As a method it is obviously authorized and seems generally considered legal.

Second. Is the tax imposed by amended sections 58-546 *ff.* a property tax as held by the Commission and contended by the Commonwealth, or is it only a tax on the privilege of conducting an interstate express business in Virginia as contended by the appellant?

In the cases of *Commonwealth* v. *Baltimore Steam Packet Co.* and *Commonwealth* v. *Norfolk, Baltimore and Carolina Line, Inc.*, 193 Va. 55, 68 S. E. 2d 137, we held that the gross receipts tax imposed on the steamship companies pursuant to what was then § 58-575 of the Code was a property tax. We so held although the statutes there involved denominated the tax a license tax levied for the privilege of doing business in this State, and in addition to the annual registration fee and property tax levied by other statutes,

We there reviewed a number of Supreme Court decisions and concluded therefrom that the tax so assessed was not invalid as being a tax upon the privilege of carrying on an exclusively interstate business, but one fairly apportioned to the business carried on within the State, and was in its derivation and substance a tax on an element of value of the physical properties not otherwise taxed. Appeals from that decision were dismissed by the Supreme Court. *Baltimore Steam Packet Co.* v. *Commonwealth*, 343 U. S. 923, 72 S. Ct. 763, 96 L. ed. 1335; *Norfolk, Baltimore and Carolina Line, Inc.* v. *Commonwealth*, 343 U. S. 923, 72 S. Ct. 764, 96 L. ed. 1335.

Afterwards, in *Railway Express Agency, Inc.* v. *Commonwealth*, 347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757, the Supreme Court in a five to four decision reversed the holding of this court, 194 Va. 757, 75 S. E. 2d 61, that what was then § 58-547 of the Code, which imposed what that statute termed a license tax "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided," to be measured by the gross receipts from operations in this State, was a constitutionally valid property tax measured by the gross receipts from business done in Virginia.

The Supreme Court, in the majority opinion, said that the legislature had given a "trinity of characterizations to the tax," naming it "an annual license tax," "in addition to" the property tax levied by what was then the preceding § 58-546, and laid "for the privilege of doing business in this State," and "we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business".

The dissenting Justices were of the opinion that the name given the tax by this court "meshes with the state's taxing

scheme," and was "perfectly consistent with its earlier expressions on the subject". The majority opinion said the court had sustained and would sustain the power of the State to tax, without discrimination, all property within its jurisdiction, and to include in its assessment "or to assess separately" the value added by the property's assemblage into a going business, "even if that business be solely interstate commerce".

In the present case we are dealing with statutes different from those before the Supreme Court in the former *Railway Express Agency* case. Present § 58-546 imposes only "a franchise tax which shall be in lieu of taxes upon all of its *other* intangible property and in lieu of property taxes on its rolling stock" (emphasis added). Section 58-547 provides that this franchise tax shall be equal to 2.15% of gross receipts derived from operations in this State. Section 58-551 permits the locality to impose a tax on real estate and tangible personal property other than rolling stock on the basis of the assessment thereof made by the Commission for that purpose and at the same rate as imposed by the locality on the same kind of property. Section 58-553 provides that the taxes so imposed and authorized shall be in lieu of all other taxes and of all licenses on such companies, except the motor vehicle license or fuel tax prescribed by law or the annual registration fee.

As we pointed out in the *Steamship* cases, *supra*, our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of all public service corporations, providing for the imposition by local authorities of *ad valorem* taxes on tangible property on the basis of valuation fixed by the State Corporation Commission, and the imposition of a franchise tax measured by gross receipts for the support of the State government; and that in making the assessments of the tangible property for local taxation,

the Commission must *exclude* such franchise value as may be inherent therein, with the result that only the "bare bones" value of such property is taxed by the localities, leaving the intangible or "going concern" value to be taxed by the State for the protection and services rendered by it. The statutes now under consideration fit into and "mesh" with that scheme, and make plain, we think, the legislative intent, in keeping with the constitutional intent from which the legislation proceeded, that the franchise tax now imposed is in fact and effect a tax on intangible property of the company, of great value, which except for this franchise tax would be immune from the payment of any tax.

As stated by the Commission in its opinion, it has been the policy of Virginia since the adoption of its present Constitution in 1902 to impose franchise taxes measured by gross receipts instead of income taxes on public utilities. The Constitution itself (§ 177) imposed the tax on railroads and the tax on other companies was left to the legislature. When the proposed system was submitted to the Convention which formulated the Constitution, its Committee on Taxation and Finance reported in part:

"* * * The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at; * * *. * * * If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of

the individual owner. * * *" Debates, Constitutional Convention, 1901-2, Vol. II, p. 2857.

Consonant with the Committee's purpose, § 170 of the Constitution adopted by the Convention provides that the General Assembly "may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon *other* property". (Emphasis added.)

The fact that a franchise tax based on the gross receipts of a corporation is a tax on its intangible property was not created by the framers of the Virginia Constitution. More than six years before that Constitution was adopted the Supreme Court of the United States had held to that effect in the case of *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683, and (on petition to rehear) 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965, both opinions by Chief Justice Fuller. The Ohio statute required express companies to file a return and to include therein "a statement of their entire gross receipts, from whatever source derived," and in taxing the value of the property in the State the assessing board was directed to be guided "by the value of the entire capital stock of said companies, and such other evidence and rules" as would lead to the true value of their property within the State, in proportion to the entire property of the companies, as determined by the value of the capital stock thereof and the other evidence and rules. The assessing board fixed the value of the property of Adams Express Company to be taxed in Ohio at $533,095.80. That company had reported the value of its real estate in Ohio at $25,170 and its personal property, including moneys and credits, at $42,065; its gross receipts from all sources within the State at $282,181 and its 120,000 shares at $140 to $150 a share. The company contended that the market price of its

shares afforded no reasonable basis for estimating the value of its property and that the scheme of taxation was illegal, was a tax on interstate commerce and a denial of Due Process and Equal Protection.

The court held that the value of the property of the company was not limited to its tangible items, but included its "unit of use and management," and that its horses, wagons, and furniture, its contracts for transportation facilities and the capital necessary to carry on the business, whether represented in tangible or intangible property in Ohio, "possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others," referring to railroad, telegraph and sleeping car companies. The court said:

"* * * The taxation is essentially a property tax, and, as such, not an interference with interstate commerce."

In the opinion denying a rehearing, 166 U. S. 185, 218-19, 17 S. Ct. 604, 605, 41 L. ed. 965, 977, the court said in reply to the contention of the express companies that they had in the State only certain tangible personal property which must be valued as other like property and upon such value alone the assessment must be made:

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. * * * Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property

must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property?"

Again it was said: "If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the goodwill of an organized and established industry must be recognized as a thing of value." 166 U. S. at 221, 17 S. Ct. at 606, 41 L. ed. at 978.

"* * * Do not these intangible properties — these franchises to do — exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?" 166 U. S. at 225, 17 S. Ct. at 608, 41 L. ed. at 979.

Great Northern Ry. Co. v. *Minnesota*, 278 U. S. 503, 49 S. Ct. 191, 73 L. ed. 477, involved a Minnesota statute which imposed a tax, measured by gross receipts, upon all railroad companies, "in lieu of all taxes upon all of their property within the state". Of it the court said: "The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state." See also *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994; *United States Exp. Co.* v. *Minnesota*, 223 U. S. 335, 32 S. Ct. 211, 56 L. ed. 459; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823, 115 A.L.R. 944; *Canton R. Co.* v. *Rogan*, 340 U. S. 511, 71 S. Ct. 447, 95 L. ed. 488.

The appellant contends that if the franchise tax be considered a property tax the amount of it is out of proportion to its property in Virginia and reflects the value of property outside of Virginia, and it complains that the Commission

made no dollars and cents valuation of the intangible or going concern value of the company's property. The appellant says that it reported the value of its real and tangible personal property in Virginia for 1956 at $458,565.16, and instead of determining the going concern value of that property, the Commission assessed a franchise tax on its gross receipts calculated to have been derived from business in this State.

It is to be remembered, however, that the appellant owns under its contract the exclusive express privileges on 177 railroads of the country, as well as on truck lines, airlines and steamboat lines. From these contract privileges it earned in 1955, according to its Annual Report to the Commission, in gross operating revenues the sum of $387,854,479, and paid to the carriers the net sum of $146,522,248. Part of this operating revenues was earned in Virginia. These earnings added a large intangible value to the tangible value of the separate items of tangible properties in Virginia which were valued by the appellant at $458,565.16. Based on the proportion of Virginia mileage to system mileage, as ascertained by the Commission, these express privileges on six railroads and five airlines in Virginia earned $6,499,519 in 1955. Said the Supreme Court in *Adams Express Co.* v. *Ohio, supra:*

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man." 166 U. S. at 219-20, 17 S. Ct. at 605-6, 41 L. ed. at 977.

The going concern value of a business, as said by the Commission in its opinion, "depends on the value of the business as a going concern and not on the value of the land, machinery, equipment and tools used in the business." And it added:

"In the case before us the Delaware Company would have the same business it has now even if it did not own a penny's worth of tangible property in Virginia. The Delaware Company owns all the stock of the Virginia Company. The two companies do all their business in the same places in the same vehicles with the same employees. If the parent company should transfer title to all the property used in the business to the local company, it would own no tangible property in Virginia but the going concern value of the business would not be affected in any way. The Railway Express Agency is the only big business in America that has an absolute nationwide monopoly. Counsel says that this vast monopoly has no going concern value because all its earnings go to the railroads who own it. Railway Express Agency was incorporated by the railroads and owns the monopoly as a separate entity, and it is taxable as separate entity like any other corporation. Such a monopoly built up over the years by the expenditure of millions of dollars is not the sort of property that is bought and sold in the market place, but it is nevertheless a thing of great value. It is a unique kind of property, but the fact that it is unique is not a reason for holding it to be exempt from taxation. The fact that the value of that unique property cannot be appraised in dollars and cents like a piece of real estate is a reason for measuring the tax by gross receipts."

The legislature, in the statutes set out above, provided that the tax should be equal to 2.15% of the gross receipts from operations in this State and in lieu of all other taxes

on intangible property and in lieu of property tax on rolling stock. For years prior to 1954 the appellant reported to the Commission the amount of its gross receipts or agreed to the amount fixed by the Commission. For 1956 it reported, as stated, that it had no way of determining its gross receipts from interstate business in Virginia and that it kept no books from which it could ascertain such gross receipts and the cost of doing so would have been prohibitive, but without any supporting evidence to explain how much and why. The Commission thereupon ascertained in the best way it could the amount of these gross receipts to be $6,499,519. If that was too much and if there was included in the calculation, as appellant contends, the value of property outside of Virginia, it was the duty of the appellant to present evidence to show what reduction should be made, or to have explored the possibility of an agreement about it as in prior years (*Railway Express Agency, Inc.* v. *Commonwealth,* 194 Va. 757, 75 S. E. 2d 61).

There is no evidence in the record as to the relation between the Company's property and its revenues in other States. Code § 58-672 and § 58-1122 provide ample means for correcting excessive assessments. Clearly the burden was on the appellant to produce evidence to show in what way and to what extent the assessment made by the Commission was too much. It did not do so but centered its attack on the constitutionality of the taxing statute. We take the finding of value by the Commission as *prima facie* correct, Constitution § 156(f). It is not incredible that a property which produced gross earnings of $6,000,000 in one year would have a value of that much.

In *Adams Express Co.* v. *Ohio, supra,* the court said it was suggested that the company might have "bonds, stocks, or other investments which produce a part of the value of

its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. * * * It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable." 166 U. S. at 222-3, 17 S. Ct. at 607, 41 L. ed. at 978.

Third. Appellant contends that the Commission, contrary to its former practice, classified its automotive equipment and trucks as rolling stock rather than as tangible personal property, thereby making the franchise tax displace a property tax on a larger value of the company's properties. As stated, § 58-546 provides that the franchise tax is "in lieu of property taxes on its rolling stock" as well as in lieu of taxes on all intangibles. The appellant argues that its automotive equipment and trucks should still be treated by the Commission as tangible personal property as in former years, to be taxed by the localities. Section 171 of the Constitution provides that tangible personal property "except the rolling stock of public service corporations" shall be subject to local taxation only. The result of the Commission's action is to relieve appellant's automotive equipment and trucks of local taxation and also of State taxation except as their value is reflected in the franchise tax. This value is stated to be $262,719.63.

The Commonwealth says that this question is collateral to the issue here because this is a statutory proceeding to correct an erroneous assessment, not a proceeding to compel an assessment to be made. This is true, but considering the point on its merits we think the Commission was warranted if not required by the amended statutes to classify the automotive equipment and trucks as rolling stock. Un-

der the Constitution, § 171, *supra*, the legislature has the right to impose a State tax on rolling stock. *East Coast Freight Lines* v. *Richmond*, 194 Va. 517, 74 S. E. 2d 283. It seems logical to classify the automotive equipment and trucks used by the appellant in transporting express as rolling stock. The legislature so classified similar property in Article 11, Chapter 12, Title 58 of the Code, which requires the Commission to assess the rolling stock of motor vehicle carriers, "which shall include all busses, trucks, tractor trucks, trailers and semi-trailers and all other equipment which it is reasonably proper to class as rolling stock * * *." Having the right to tax rolling stock, the legislature clearly directed in § 58-546 that this type of tangible property should be relieved of any other taxation than that imposed by the franchise tax to be paid by the company.

Fourth. Appellant's remaining contention is that the Commission erred in rejecting as immaterial its Exhibits 1 and 5 and so much of 3, 4 and 6 as did not relate to the year 1956.

Exhibit No. 1 was appellant's agreement with the railroads, offered to show that appellant's gross receipts were paid to the railroads after paying operating expenses and maintenance charges. Its annual report filed in the evidence showed that. No. 6 was a statement of the assessments and taxes of the Virginia Company, not the appellant, on its tangible and intangible property involved in its intrastate business from 1933 through 1956. No. 3 showed the gross receipts of the appellant from 1931 through 1956, except for 1954 and 1955, as determined by the Commission, together with other intangibles and tangible property and the tax imposed thereon for those years; No. 4, its tangible property, including automotive equipment and trucks, and the local taxes paid thereon for the years 1931-1956; No. 5,

the number, cost and market value of its automotive equipment in the cities of the State for 1956. Appellant says these last three were material to its contention, dealt with in "Third" above, that its automotive equipment and trucks should have been assessed in 1956 as tangible property and not as rolling stock.

We agree with the Commission that these offered exhibits were immaterial on the issue to which they were claimed to relate, *i.e.*, whether the franchise tax for 1956 imposed by amended § 58-546 was unconstitutional. While the exhibits might well have been received as information, and are in the record before us and have been referred to in argument so far as considered useful, yet any materiality to the questions raised is remote if at all existent, and it was not reversible error to refuse them.

For the reasons stated we hold that the franchise tax in question is a property tax, not prohibited by the Commerce Clause or other clauses of the Constitution of the United States, and validly imposed by the amended sections of the Code referred to. The order of the State Corporation Commission appealed from is accordingly

Affirmed.

APPENDIX C

Article 4, Chapter 12, Title 58 of Code of Virginia (1950) as amended

Article 4, Chapter 12, Title 58 of the Code of Virginia (1950) as amended by an act of the General Assembly of Virginia approved March 31, 1956 (Acts, 1956, Chapter 612):

Express Companies

§ 58-546. Franchise tax on express companies. — Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.

§ 58-547. Amount of franchise tax.—The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State.

§ 58-548. Annual report.—Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding.

§ 58-549. Assessments by Commission.—The Commission shall, after thirty days' notice previously given by it to the company, assess the franchise tax and the value of the real estate and tangible personal property

other than rolling stock. Should any company fail to make the report required by this article on or before the fifteenth day of April the Commission shall make the assessments upon the best and most reliable information that it can procure. In the execution of such duty the Commission shall be empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers.

§ 58-550. Copies of assessment for Comptroller and company.—A certified copy of the assessment when made shall be immediately sent by the clerk of the Commission to the Comptroller and to the company.

§ 58-551. Copy of assessment for local authorities. —The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein is situated real estate and tangible personal property other than rolling stock belonging to the company a certified copy of the assessment of the value of such property. The assessment shall show the character of the property and its value and location for the purpose of taxation in such city, town, county and district, so that city, town, county and district levies may be imposed upon the same at the same rate or rates as are imposed upon other real estate and tangible personal property located in such localities.

§ 58-552. Payment of State tax. — Such company shall pay into the State treasury by the first day of June following the assessment the franchise tax assessed against it.

§ 58-553. No other taxes on express companies; exceptions.—The taxes imposed by this article and authorized to be imposed shall be in lieu of all other taxes and of all licenses, State, county and municipal, upon such companies, except that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax,

heretofore or hereafter imposed by law, or the annual registration fee.

§ 58-554. Penalty for failure to pay.—Any express company failing to pay its franchise tax by the first day of June following the assessment shall incur a penalty thereon of five per cent, which shall be added to the amount of the tax.

§ 58-555. Penalty for failure to report.—Any such company failing to make the report required by § 58-548 within the time prescribed shall be liable to a fine of not more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to the defendant by rule to show cause.